

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION

IN THE MATTER OF: BID PROTEST
COMPLEX FOR INDUSTRIAL AND
ECONOMIC DEVELOPMENT
STATE PROJECT H59-9783-PG
M. B. KAHN CONSTRUCTION CO., INC.
vs.
TRIDENT TECHNICAL COLLEGE

DECISION

POSTING DATE: July 17, 2002

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from M. B. Kahn Construction Co., Inc. (Kahn) under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code (Code), for an administrative review on the Complex for Industrial and Economic Development project (Project) for Trident Technical College (Trident). Pursuant to §11-35-4210(3) of the Code, the CPOC evaluated the issues for potential resolution by mutual agreement and determined that mediation was not appropriate. A decision is issued without a formal hearing after a thorough review of the bidding documents and the applicable law.

NATURE OF THE PROTEST

On June 25, 2002 Trident received and opened bids for the construction of the Project. Included in the Bid Form was an additional page (BF-5) requesting an itemized breakdown of the costs for that portion of the Work to be funded by a grant from the U.S. Economic Development Administration (EDA). The apparent low bidder, Mashburn Construction Company, Inc. (Mashburn), submitted a BF-5 with a total price only, not the itemized breakdown requested. After evaluation of the bids Trident posted a Notice of Intent to Award in favor of Mashburn. Kahn protests this decision.

FINDINGS OF FACT

1. On April 18, 2002, Trident solicited bids for the construction of the Project. Included in the Bidding Documents was form SE-330, Bid Form. The standard form was modified to include an additional page, BF-5. This page contained the following title information, in addition to a listing of specific elements of work for which prices were to be provided:

*Information Technology Center
Incremental Pricing*

Provide the following prices for that portion of the work included in the Information Technology Center. Refer to Division 1 Section "Summary" for a description of the work and a plan delineating this area. These prices are provided for information and are included in the lump sum bid.

2. One June 18, 2002 Trident issued Addendum 6 [Exh. 2] to the Bidding Documents. Page BF-5 was modified the list of prices and deleted the words "Incremental Pricing" from the header quoted above.
3. On June 25, 2002 Trident received and opened bids for the construction of the Project. The apparent low bidder was Mashburn. Mashburn's Bid Form [Exh. 3] included page BF-5 with a price listed for "Administration" and the same value carried down to the "ITC TOTAL".

DISCUSSION

PROTESTANT'S POSITION

Kahn argues that the Bidding Documents "...clearly attach significance to the inclusion of the completed breakdown of the incremental pricing for the Information Technology Center within the bid..." [emphasis in original] Kahn contends that Trident's decision to waive Mashburn's failure to provide the requested information "...places...Kahn...at a competitive disadvantage which is unjust and which clearly contradicts the plain and common reading of the Bidding Documents." In support of its position Kahn submitted several examples wherein the importance of providing this information was emphasized. Kahn maintains that by choosing to overlook Mashburn's failure to provide the requested information, Mashburn achieves the benefit of a competitive advantage over those who chose to "...devote the time and human resources...required to prepare the breakdown...".

RESPONDENT'S POSITION

Trident contends that Mashburn complied with the *Instructions to Bidders* by providing page BF-5 in its bid and further, that the prices requested "...are for information and do not affect the lump sum bid. Trident characterizes the data requested as "...similar in nature to the unit prices provided with the bid..."

CPOC FINDINGS

Section 11-35-20 of the Code defines the underlying public purposes and policies of the Code, including":

(a) to provide increased economy in state procurement activities and to maximize to the fullest extent practicable the purchasing values of funds while ensuring that procurements are the most advantageous to the State...

In the area of construction, this fundamental public goal is normally achieved through the award of contracts to the lowest responsive and responsible bidder in accordance with the competitive sealed bidding process as described in §11-35-3020 of the Code:

*...(2)(c) In lieu of Section 11-35-1520(10) the following provisions apply. Unless there is a **compelling reason to reject bids** as prescribed by regulation of the board, notice of an intended award of a contract to the lowest **responsive** and responsible bidder whose bid meets the requirements set forth in the invitation for bids shall be given by posting such notice at a location which has been specified in the invitation for bids. [emphasis added]*

Permissible reasons for rejecting bids are defined in Board Regulation 19-445.2070 of the SC Code of Laws, as amended, which states in relevant part:

A. General Application.

Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.

The essential requirements for qualification as a “responsive bidder” are defined in §11-35-1410:

...(7) “Responsive bidder or offeror” means a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals.

Subparagraph 5.3.3 of the *Instructions to Bidders* (contained in 00201-OSE) states as follows:

5.3.3 Bids shall not be rejected for the following reasons, which include, but are not limited to:

...

5.3.3.7 Failure to provide an Incremental Price or a Unit Price when requested on the SE-330; or,...

5.3.3.13 Immaterial variation from the exact requirements of the Bidding Documents.

While the CPOC is sympathetic to Kahn’s claim that Trident’s words and documents emphasized the fact that incremental pricing was being requested as part of the bid documents, the essential and inescapable fact is that the pricing Trident requested was just that—incremental. The CPOC believes there is no confusion on this issue—Kahn’s own letter of protest characterizes the cost breakdown as “incremental pricing.” The data listed on page BF-5 was defined in the original Bidding Documents and, to adapt Kahn’s own words of protest, despite the fact that the Bid Form was modified two times by addenda, this characterization was never changed. Incremental pricing is not a material or essential element in the identification of the low bid and, as stated above, clause 5.3.3.7 of the *Instructions to Bidders* clearly states that bids will not be rejected for a failure to provide incremental prices.

DECISION

It is the decision of the Chief Procurement Officer for Construction that the protest of M. B. Kahn Construction Co., Inc. is denied. Trident Technical College may proceed with the award and execution of the contract for the construction of the Complex for Industrial and Economic Development, consistent with its programmatic needs.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Michael M. Thomas". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

Michael M. Thomas
Chief Procurement Officer
for Construction

July 17, 2002
Date

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4230, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review shall be directed to the appropriate chief procurement officer who shall forward the request to the Panel or to the Procurement Review Panel and shall be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

Additional information regarding the administrative review process is available on the internet at the following Web site: <http://www.state.sc.us/mmo/legal/lawmenu.htm>